



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION II

290 BROADWAY

NEW YORK, NEW YORK 10007-1866

July 21, 2010

BY EMAIL AND FIRST CLASS MAIL

Christopher Marraro, Esq.
Howrey LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

Re: Diamond Alkali Superfund Site - Lower Passaic River Study Area, New Jersey
Cooper Industries, L.L.C. as Successor to McGraw-Edison Company

Dear Mr. Marraro:

This will respond to your letter dated June 30, 2010 concerning the connection between your client, Cooper Industries, L.L.C. ("Cooper") and the Lower Passaic River Study Area. As discussed below, EPA does not agree with Cooper's position that it is not a potentially responsible party under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") simply because Cooper itself did not own or operate either of the facilities identified in EPA's March 10, 2010 notice of liability.

Thomas A. Edison, Inc. owned and operated the facility at 75 Belmont Avenue in the Silver Lake area of New Jersey, which you identify as the "Belmont" facility, until merging with McGraw Electric in 1957 to form McGraw-Edison Company. McGraw-Edison Company owned and operated the facility from the time of the merger, until, according to your letter, conveying the facility to Battery Products, Inc., a sister corporation, in 1985. In 2004, McGraw-Edison Company merged with Cooper.

When two corporations merge or consolidate, the liabilities of the selling corporation become the liabilities of the surviving corporation. *Smith Land & Improvement Corp. v. Celotex Corp.*, 851 F.2d 86, 91 (3d Cir. 1988). Thus, the liabilities of Thomas A. Edison, Inc., which merged with McGraw Electric to form McGraw-Edison Company, and the liabilities of McGraw-Edison Company, which merged with Cooper, have all come to reside with Cooper. The fact that McGraw-Edison Company sold the Belmont operations does not affect Cooper's liability as the successor corporation. Further, it is not relevant that the sale or transfer occurred prior to the 1985 purchase of McGraw-Edison Company by Cooper Industries, Inc., or Cooper's merger with McGraw-Edison Company.

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Your letter asserts that in 1985, when McGraw-Edison Company transferred the Belmont facility to Battery Products, Inc., the latter company agreed to assume liabilities associated with past operations at the Belmont facility. Since this transfer was evidently a transfer of assets, and not a merger, it is also not relevant to Cooper's liability. Under CERCLA Section 107(e):

[n]o indemnification, hold harmless agreement or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section.

42 U.S.C. § 9607(e)(1). Courts have interpreted this language to mean that while contractual agreements to transfer liability are enforceable as between the parties to the agreement, they do not serve to transfer liability to the Government from one party to the other. See, e.g., *Horsehead Industries v. Paramount Communications, Inc.*, 258 F.3d 132, 135 (3d Cir. 2001); *SmithKline Beecham Corp. v. Rohm & Haas*, 89 F.3d 154, 158 (3d Cir. 1996).

In short, there is a direct line of succession from Thomas A. Edison, Inc., through McGraw-Edison Company, to Cooper. Cooper cannot avoid liability by pointing to a contractual agreement entered into by its corporate predecessor. Nor can Cooper avoid liability by asserting that it did not own or operate facilities that its corporate predecessors did own and operate.

A similar line of succession exists for the facility located at Belleville and Sherman Avenues, in Glen Ridge. It is reported on the website for Rutgers University's Thomas A. Edison Papers research center (available at <http://edison.rutgers.edu/list.htm>), that Edison Storage Battery Company ("ESBC") ended its legal existence and became the Storage Battery Division of Thomas A. Edison, Inc. on June 30, 1932. EPA understands this to mean that ESBC merged into Thomas A. Edison, Inc., such that the liabilities of ESBC came to reside with Thomas A. Edison, Inc. Thus, while you have uncovered evidence that ESBC transferred title to the Glen Ridge facility in 1919, the liabilities associated with ESBC's operation of that facility prior to 1919 flowed to Thomas A. Edison, and now are with Cooper. McGraw-Edison Company's sale of assets identified as its "Edison Storage Battery Division" in 1960 is not significant in the analysis of Cooper's liability.

Finally, EPA does not agree with Cooper's position that the historical evidence of discharges from the facilities identified by the Cooperating Parties Group ("CPG") is insufficient to establish a nexus to the Lower Passaic River Study Area. The citation in your June 30, 2010 letter to *New Jersey Turnpike Authority v. PPG Industries, Inc.* to support the notion that the CPG could not meet a causation requirement is somewhat puzzling, since in that case, the Third

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Circuit reiterated the principle that a CERCLA plaintiff "need not prove causation in the traditional sense of the word." 197 F.3d 96, 105 (3d Cir. 1999). The problem of proof faced by the plaintiff in *New Jersey Turnpike Authority* arose because the case involved discrete locations at which chromite ore processing residue had been disposed of, and the plaintiff was unable to connect particular defendants with particular locations. This is quite different from the issue of establishing that hazardous substances were discharged from facilities owned and operated by Cooper's predecessors into tributaries of the Passaic River. Even a quick review of the information gathered by the CPG and presented to EPA in April 2009, shows that a great deal of historical information has been presented concerning discharges from the Belmont (Silver Lake) facility to the Second River, over a long period of time. EPA is also aware that the CPG has collected documentation that ESBC and later the Storage Battery Division of Thomas A. Edison, Inc., operated in West Orange as well, at another location that discharged into the Second River.

I suggest that Cooper consider further dialogue with the CPG, which I understand has gathered additional information concerning the operations of Cooper's corporate predecessors and their relationship to the Lower Passaic River Study Area. Alternately, please do not hesitate to call me at 212-637-3136 if you wish to discuss this matter.

Sincerely,



Sarah P. Flanagan
Assistant Regional Counsel.

cc: William H. Hyatt, Esq.